IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:	)	
HENRY ORTLIEB'S ORIGINAL	)	Chapter 7
PHILADELPHIA BEER WORKS	)	
Debtor	)	Bankr. Case No. 00-15842
	)	
ROBERT L. JONES	)	
Appellant	)	Civil Action No. 00-5884
	)	
v.	)	
	)	
PATRICIA STAIANO, TRUSTEE	)	
Appellee	)	

MEMORANDUM

Padova, J. **January , 2001**

This is an appeal from an Order of the Bankruptcy Court for the Eastern District of Pennsylvania, issued on October 12, 2000. The matter is fully briefed and ripe for decision. For the reasons that follow, the Court affirms the Order of the Bankruptcy Court.

I. Background

This action arises from three Chapter 11 cases filed in April and May of 2000, in relation to three debtor entities: Henry Ortlieb's Original Philadelphia Beer Works, DS Brewing Company, and HAO Holding Company. Henry Ortlieb was the president and sole member of the Board of Directors for each entity. The Debtors held the trademark and manufacturing rights to certain brands of beer, and operated the brew pub located at 829 North American Street in Philadelphia. The case filings were generally prompted by an execution sale scheduled by a judgment creditor of one of the entities.

Upon motion of the United States Trustee, the cases were converted to Chapter 7.

Ortlieb entered into a consulting agreement with Corporate Management Inc. ("CMI"), owned by Gino Antonelli.[1] Under the agreement, executed between CMI and HAO Holding Company, CMI's role was to organize the company's creditors and bring in fresh capital. (Bankr. Hr'g Tr. at 9.) Subsequent to the Chapter 11 filings, CMI arranged for certain post-petition loans to the Debtors, in the amount in excess of $300,000, from an individual named Len Fox. (Op. Sur Order of Bankr. Ct. Oct. 12, 2000 at 3.) The funds were placed into an escrow account with the New Jersey Law Firm of McCrink, Nelson & Kehler, rather than into a Debtor-in-Possession account. Appellant, Antonelli, and Fox authorized payments to be made from this account to pay certain pre-petition debts, as well as professional fees. (Id.) From these funds, Appellant received $8,000, CMI received $11,000, and McCrink, Nelson & Kehler received $4,000. (Id.)

The Trustee filed a motion with the Bankruptcy Court to disgorge the $23,000 in professional fees paid to these individuals and entities, on the basis that the payments were unauthorized in that the professionals involved did not comply with the requirements of 11 U.S.C. §§ 327, 330, and 331. (Trustee's Disgorgement Mot. ¶¶ 31-32.) Under the bankruptcy rules, a debtor-in-possession must file an application and seek approval to retain a professional. Fed. R. Bankr. P. 2014(a). No such approval was sought. (Op. Sur Order of Bankr. Ct. Oct. 12, 2000 at 4.) Appellant appeals the part of the Order ordering him to disgorge $8,000 in fees paid to him in the course of his representation. Specifically, the Bankruptcy Court found that the monies from which he was paid were part of the debtor estate. (Bankr. Hn'g Tr. at 68.) Appellant disputes this finding, and contends that the monies were separate from the estate, and that his fees were therefore not improperly paid. (Appellant's Br.

[1]Mr. Antonelli is president, sole director and sole officer of CMI. (Tr. Oct. 12, 2000, at 6.)

at 2.)

II. Standard of Review

"In bankruptcy cases, the district court sits as an appellate court." In re Cohn, 54 F.3d 1108, 1113 (3d Cir. 1995). "As a proceeding tried initially before the Bankruptcy Court for the Eastern District of Pennsylvania, the standard of review for the district court is governed by [Federal Rule of Bankruptcy Procedure] 8013." Id. It provides:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Fed. R. Bankr. P. 8013 (Supp. 2000). The district court "applies a clearly erroneous standard to findings of fact, conducts plenary review of conclusions of law, and must break down mixed question of law and fact, applying the appropriate standard to each component." Meridian Bank v. Alten, 958 F.2d 1226, 1229 (3d Cir. 1992) (quoting In re Sharon Steel Corp., 871 F.2d 1217, 1222 (3d Cir. 1989)). De novo review requires the district court to make its own legal conclusions, "without deferential regard to those made by the bankruptcy court." Fleet Consumer Discount Co. v. Graves, 156 B.R. 949, 954 (E.D. Pa. 1993), aff'd, 33 F.3d 242 (3d Cir. 1994).

The present appeal raises a mixed issue of law and fact. Therefore, the Court will review the factual findings for clear error and conclusions of law de novo.

III. Discussion

The sole issue raised by Appellant is whether the Bankruptcy Court erred in its determination that the funds from which Appellant was paid his fees were property that was part of the estate as

defined by 11 U.S.C. § 541.[2] Section 541 of the Bankruptcy Code provides, in pertinent part, that the "property of the estate" comprises, with certain exceptions, "all legal or equitable interests of the debtor in property as of the commencement of the case [and a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(1,7).

The Bankruptcy Court made its determination on the basis of a lengthy hearing, depositions, and other paper documents. At the hearing, Gino Antonelli, president of CMI, testified to the following:

1. Antonelli instructed that the locks be changed at the 829 North American Street location. (Bankr. Hn'g Tr. at 18.)
2. Antonelli, along with accountants Jimmy Brennan and Nelson Cuello, were in control of the Debtor's finances in the period from May 4 to June 7, 2000. (Id. at 20.)
3. The law firm of McKrink, Nelson & Kehler served as the escrow agent in the bankruptcy proceedings. (Id. at 21.)
4. Len Fox wired $50,000 on April 17, 2000, $50,000 on April 28, 2000, to the account established by McKrink, Nelson and Kehler, according to the MN&K client ledger. (Id. at 37.)
5. At the time of the first wire of funds from Mr. Fox, "the moneys went into the escrow agent's account, which was his escrow account, although it was earmarked for the company, did not go into the company funds. Those funds went directly into the escrow agent's account." (Id. at 21-22.)
6. Mr. Antonelli later learned that the debtor-in-possession ("DIP") accounts had to be opened, and Mr. Kehler then started to open DIP accounts. "[T]he moneys that were transferred by [Mr. Antonelli's] investors into . . . Mr. Kehler's account were [their] funds for the benefit of the company, but never entering into the . . . company accounts." (Id. at 22.)
7. Some of the payments made from the trust account were to repay loans, pursuant to the April 20 agreement, made by investors to HAO and Henry Ortlieb's Original Beer Works. (Id. at 22-23.)
8. Len Fox requested that Henry Ortlieb resign his positions in the companies, and the two had lengthy discussion. (Id. at 25.)

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[2]Appellee also contends that the Appellant was further disqualified from seeking fees for his professional services for the Debtor because he was an "insider" in violation of the Rules, and that Appellant was not entitled to the fees even if the funds from which he was paid were not deemed part of the estate. Because the Court concludes that the Bankruptcy Court's determination was not in error, disposition of these additional issues is unnecessary.

Mr. Antonelli additionally testified in his deposition as follows:

1. There was no loan agreement between Len Fox and CMI.
2. There was, however, an "understanding" between Mr. Antonelli and Mr. Fox as to what was to be done for the lender to place certain monies on the table.
3. The terms of the understanding included a charge of 10 percent, which is what CMI normally received from such loan advances.
4. Mr. Fox expected the funds he advanced to be repaid.

(Tr. at 38-39.)

The Bankruptcy Court had before it sufficient evidence to make its factual conclusions with respect to the nature of the funds from which Appellant was paid, and the court did not clearly err with respect to those factual conclusions. The record provides sufficient support for the findings that the funds forwarded by Mr. Fox were loan funds provided pursuant to an understanding with CMI, that the funds were used to pay various pre-petition debts and to pay loans made to the debtors pursuant to the consulting agreement, and that CMI, and not Henry Ortlieb, was in control of the Debtor estate during this period. Furthermore, the Bankruptcy Court was correct in its conclusion of law that the fact that Henry Ortlieb personally had no control over the funds had no bearing under 11 U.S.C. § 541's definition of property of the estate. That section defines property of the estate as "all legal or equitable interests of the debtor in property . . . ." Based on the language of the statutory section itself, the Bankruptcy Court was correct to conclude that the control that Henry Ortlieb might or might not have had over the funds was irrelevant. Rather, under § 541, the critical inquiry is the relationship of the funds to Henry Ortlieb's Original Philadelphia Beer Works, the Debtor entity, which was being controlled by CMI, and whose debts were being paid from the loan funds.

This Court concludes that the Bankruptcy Court did not err in determining that the monies from which Appellant was paid his fees were part of the Debtor estate. With respect to the factual

questions involved in the inquiry, the Court concludes upon examination of the extensive record that the Bankruptcy Court did not commit clear error. Furthermore, the Court concludes on plenary review that the Bankruptcy Court correctly applied 11 U.S.C. § 541 in concluding that the funds were property of the estate. The judgment of the Bankruptcy Court is therefore affirmed.

An appropriate Order follows.

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O R D E R

AND NOW, this day of January, 2001, upon consideration of the Brief of Appellant Robert L. Jones (Doc. No. 4), and the Brief of Appellee, the United States Trustee (Doc. No. 7), **IT IS HEREBY ORDERED** that the Order of the United States Bankruptcy Court for the Eastern District of Pennsylvania entered October 13, 2000, is **AFFIRMED**.

BY THE COURT:

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John R. Padova, J.